Supreme Court of the United States

October Term, 1978

No. 78-276

In the Matter of

CHARLES J. HYNES, as Deputy Attorney General for Health, Social Services and Nursing Homes,

Respondent,

against

ROLAND LERNER,

Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

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Statement

On May 4, 1978, the New York State Court of Appeals unanimously affirmed an order of the Appellate Division, First Department. *Matter of Hynes* v. *Lerner,* 44 N.Y.2d 329 (1975). The Appellate Division had unanimously affirmed an order of the Supreme Court, Bronx County, entered January 25, 1977, denying Roland Lerner's second motion to quash a grand jury subpoena duces tecum, which

had been issued on October 26, 1976. *Matter of Hynes* v. *Lerner*, 57 A.D.2d 752 (2d Dept. 1977). Lerner has filed a notice of appeal to appeal this decision to this Court. This brief is submitted in support of a motion to dismiss this appeal or, in the alternative, to affirm the decision of the Court of Appeals.

Introduction

[The history of a grand jury subpoena duces tecum issued on October 26, 1976, almost two full years ago.]

A grand jury subpoena is issued on October 26, 1976.

On October 26, 1976, a grand jury subpoena duces tecum was issued to Roland Lerner. This subpoena directed Mr. Lerner, the owner and operator of the Park View Nursing Home, to appear before a Bronx County Grand Jury investigating the operation of nursing homes in Bronx County on November 3, 1976 with certain books and records of the home.

Lerner challenges the subpoena in federal court.

Roland Lerner first challenged this subpoena by attacking the constitutionality of Section 190.40(2)(c) of the New York State Criminal Procedure Law in federal court. This statute provides that a witness appearing before a New York State grand jury who gives evidence receives automatic immunity if he had a Fifth Amendment privilege with respect to the giving of that evidence. Lerner argued that this statute was unconstitutional because it would not confer immunity upon him for producing his nursing home books and records since he had no Fifth Amendment privilege with respect to those books and records. Lerner asked Judge KNAPP of the District Court of the Southern District of New York to preliminarily enjoin enforcement of this grand jury subpoena and to convene a three-judge bench, pursuant to 28 U.S.C. §2281, to determine the constitutionality of Section 190.40(2)(c) of the Criminal Procedure Law. *Lerner & Park View Nursing Home* v. *Hynes*, 76 Civ. 4855 (WK). Judge KNAPP denied the motion for a preliminary injunction on November 1, 1976. Thereafter, Lerner withdrew his motion, without prejudice.

Lerner challenges the subpoena in state court.

Lerner next moved in the Supreme Court, Bronx County, for an order quashing this subpoena. A temporary stay of the subpoena was granted by the court pending consideration of this motion. *Matter of Lerner* v. *Hynes*. On November 4, 1976, after hearing argument from both sides, Justice TONETTI of the Bronx County Supreme Court orally denied this motion. On December 10, 1976, an order was entered denying this motion. This order directed Lerner to appear before the grand jury on December 15, 1976 with the subpoenaed records.

Although Lerner appeared before the grand jury on December 15, 1976, he did not produce the subpoenaed records, except for a few items.

A motion is made by the Deputy Attorney General to have Lerner held in contempt; he brings a second motion to quash the subpoena in response.

The Deputy Attorney General brought a motion to have Lerner cited for contempt. *Matter of Hynes* v. *Lerner*. Lerner cross-moved to have the subpoena quashed, arguing

that the subpoenaed materials were being sought for the improper purpose of enabling the Deputy Attorney General to prepare for the trial of an indictment filed against Lerner on November 8, 1976. This indictment charged Lerner with twenty-four counts of Wilful Violation of the Health Laws [Public Health Law §12-b(2)] for soliciting and receiving kickbacks from vendors to his nursing home and one count of Conspiracy in the Fourth Degree [Penal Law §105.00]. Bronx County Indictment No. 2543-76. In response to this motion, the Deputy Attorney General submitted an affirmation stating that the grand jury was continuing its investigation of Lerner to determine whether he had committed other crimes in addition to those already charged, such as Offering a False Instrument for Filing [Penal Law §175.35] or Larceny [Penal Law §§155.00 et seq.]. In addition, the Deputy Attorney General submitted an *in camera* affirmation to the court detailing the evidence before the grand jury which supported the bona fides of its investigation into these other crimes.

Lerner is again ordered by the court to comply with the subpoena, but obtains a stay of that order pending appeal.

Justice TONETTI, in an order entered January 25, 1977, denied Lerner's cross-motion to quash the subpoena and ordered Lerner to appear before the grand jury on January 28, 1977 with the subpoenaed books and records.

Lerner obtained a stay of this order from the Appellate Division, First Department, pending his appeal from this order.

The Appellate Division unanimously affirms the lower court order.

On May 10, 1977, the Appellate Division, First Department, unanimously affirmed the order of the lower court. *Matter of Hynes* v. *Lerner,* 57 A.D.2d 752 (1st Dept. 1977).

On July 7, 1977, the Court of Appeals, in *Matter of Heisler* v. *Hynes,* holds that a grand jury subpoena duces tecum does not authorize retention of subpoenaed materials by a grand jury for more than one day at a time.

On July 7, 1977, the Court of Appeals, in another case, held that, under New York law, a grand jury subpoena duces tecum does not authorize a grand jury to retain subpoenaed evidence for more than one day at a time. The Court also held that a prosecutor cannot examine subpoenaed evidence independently of the grand jury. *Matter of Heisler* v. *Hynes,* 42 N.Y.2d 250 (1977).

Within two weeks after the Court of Appeals' decision in *Matter of Heisler* v. *Hynes,* the New York State Legislature, as an emergency measure, enacts legislation specifically overruling that decision.

On July 19, 1977, after a message of necessity was issued by the Governor in order to expedite the legislative process, the New York State Legislature overruled *Matter of Heisler* v. *Hynes* by enacting Section 610.25 of the Criminal Procedure Law, which provides that a grand jury may possess subpoenaed records for a reasonable period of time, and amending Section 190.25(4) of the Criminal Procedure Law to provide that a prosecutor may independently examine materials subpoenaed on behalf of a grand jury.

The Court of Appeals unanimously affirms the lower court decision in this case.

On May 4, 1978, the Court of Appeals unanimously affirmed the lower court decisions in this case. It upheld the determinations of the lower courts that the grand jury had a legitimate need for the subpoenaed records to determine whether Lerner, or anyone else, had committed additional crimes in connection with the operation of the Park View Nursing Home. It also refused to require the daily return of the subpoenaed materials, as Lerner sought under the authority of *Matter of Heisler* v. *Hynes, supra.* Rather, it agreed with the Deputy Attorney General that the newly enacted statutes which overruled that decision were applicable to determine the mode of compliance with the subpoena. *Matter of Hynes* v. *Lerner,* 44 N.Y.2d 329 (1978).

Lerner challenges the constitutionality of Section 610.25 of the Criminal Procedure Law in federal court.

By order to show cause dated June 1, 1978, Lerner initiated a proceeding in the District Court of the Southern District of New York to declare Section 610.25 of the Criminal Procedure Law unconstitutional, under the authority of 28 U.S.C. §1343. Lerner also asked for a preliminary injunction to bar enforcement of the subpoena pending this proceeding. *Matter of Park View Nursing Home and Roland Lerner* v. *Hynes,* 78 Civ. 2489 (LWP). On June 6, 1978, Judge Pierce dismissed this action from the bench.

Lerner refuses to comply with the subpoena and another proceeding is initiated to have him held in contempt; Lerner cross-moves to have the subpoena modified.

From the date of the Court of Appeals' decision, May 4, 1978, there was no stay of the subpoena in effect. Nevertheless, Lerner refused to comply with the subpoena. A second motion was, therefore, brought by the Deputy Attorney General to have Lerner held in contempt. This motion was brought before Justice Tonetti of the Bronx County Supreme Court. *People* v. *Roland Lerner.* In response to this motion, Lerner cross-moved to have the court set limits upon the grand jury's right to possess the subpoenaed materials. In an order dated June 7, 1978, the court granted Lerner's application to the extent of limiting the time during which the grand jury could possess the subpoenaed records. Subject to these limitations, it again ordered Lerner to comply with the subpoena. It held in abeyance any decision upon the Deputy Attorney General's motion to have Lerner held in contempt pending compliance with this order.

Lerner fails to obtain a stay of this order and complies with the subpoena.

Lerner filed a notice of appeal from this order and sought a stay pending appeal from the Appellate Division, First Department. This application was denied. Thereafter, Lerner complied with the subpoena.

Statute Involved

Section 610.25 of the Criminal Procedure Law (McKinney's Consolidated Laws of New York, Book 11A), whose constitutionality is challenged by the appellant, provides:

> §610.25 Securing attendance of witness by subpoena; possession of physical evidence
>
> 1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.
>
> 2. The possession shall be for a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

POINT I

This appeal should be dismissed because it is moot.

Lerner has complied with the subpoena which he had sought to quash in the state court proceedings from which he seeks to appeal to this Court. Therefore, his appeal is moot and should be dismissed. *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The appellant's claims on appeal are frivolous. His appeal should be dismissed for want of a substantial federal question.

The appellant claims that the New York law permitting a grand jury to possess subpoenaed materials for a reasonable period of time for the purposes of its inquiry is unconstitutional absent a requirement that there be a showing of probable cause to believe that those materials contain evidence of a crime or are the fruits or instrumentalities of a crime. He claims that the Fourth Amendment is violated by such a law. This claim is without colorable merit.

This Court, as early as its decision in *Hale* v. *Henkel,* 201 U.S. 43 (1905), has recognized that a subpoena duces tecum authorizes the temporary dispossession of an owner's property for the uses of proof in a judicial proceeding and that probable cause, within the meaning of the Fourth Amendment, is not required. As stated by this Court:

> We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley,* 2 Cromp. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ.

Id. at 73. Justice McKenna, in his dissenting opinion (based upon his disagreement with the majority that even a limited application of the "reasonableness" requirement of the Fourth Amendment to a subpoena was appropriate) also recognized that a subpoena subjects a person's property to the uses of proof:

> There can be, at most, but a temporary use of the books, and this can be accommodated to the convenience of the parties. *It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require* (emphasis added).

Id. at 80.

This Court has clearly and consistently followed its decision in *Hale* v. *Henkel, supra,* by stating that the Fourth Amendment, "if applicable" at all to a subpoena duces tecum, is satisfied if the subpoena is reasonable, without requiring a showing of probable cause. See *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 195, 208-09 (1946); *United States* v. *Dionisio,* 410 U.S. 1, 11-12 (1973); *United States* v. *Miller,* 425 U.S. 435, 445-46 (1976).

Ironically, the appellant argues that Section 610.25 of the Criminal Procedure Law is unconstitutional because

it specifically directs a court to consider three factors in determining the reasonableness of the time, terms and conditions of the grand jury's possession of subpoenaed materials. This is precisely what Justice McKenna stated that courts should do in *Hale* v. *Henkel, supra*: "It is matter for the court and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require." *Id.* at 80.

The appellant argues that he has standing to challenge the constitutionality of this statute on its face because it subjects him to the criminal sanction of contempt should he misunderstand its terms, which he characterizes as "vague." This statute is not addressed to the appellant's conduct. It does not proscribe any act or ommission or subject anyone to any penalty, civil or criminal, for failing to abide by its terms. It merely advises courts concerning the factors to be considered in exercising their discretion to set limits upon the time, terms or conditions of subpoenas duces tecum. The appellant would be subjected to a contempt citation only if he were to disobey a a court order directing him to comply with such a subpoena. Presumably, there would be nothing vague about such an order.

In any event, this entire argument is academic. Following the Court of Appeals' decision affirming the validity of the subpoena duces tecum in issue here, the lower court, acting pursuant to Section 610.25, set limits upon the time, terms and conditions under which the grand jury could possess the subpoenaed records. Lerner sought a stay so

that he could appeal from that decision. His stay application was denied. Thereafter, Lerner complied with the subpoena. He can hardly claim now that he is subject to a criminal sanction should he not comply.

Conclusion

The appellant's appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed without argument.

Respectfully submitted,

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